SUPREME COURT, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-490

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,
v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

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Rather than reconciling the Eighth Circuit's opinion below with *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), Respondent Forbes demonstrates the square conflict between the two cases. *Chandler* held that the state public broadcaster in Georgia could regulate content by deciding to air a debate between major party candidates, because "a debate between only the Democratic and Republican candidates. . .would be of the most interest and benefit to the Citizens of Georgia." 917 F.2d at 489. The news judgment was "content-based." *Id.*

Forbes argues that the Eleventh Circuit's "reference to 'content' *must* refer to the topic" of the forum. According to Forbes, specification of the topic perforce determines a class of speakers whose exclusion "must therefore be *necessarily* viewpoint-based and subject to First Amendment scrutiny." Opp. Br. at 11 (citation omitted). Of course, the broadcaster's content-based news judgment in *Chandler* would have failed this test under the Eighth Circuit's doctrine. The viewpoint that the audience would have benefited more from hearing just the major-party candidates, rather than all candidates, was not neutral; for it was based on an evaluation of the relative importance of the candidates' views in the marketplace of ideas.[1/]

In Section IV of his brief, Forbes in fact succeeds in showing the illusory nature of the Eighth Circuit's

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[1/]That is true whether or not the broadcaster offers the uninvited fringe candidate time to appear separately, as was the case in *Chandler*, or whether the fringe candidate may request separate time under the "reasonable access" entitlement for federal candidates (App. 59a.), as was true in Mr. Forbes' case.

requirement for viewpoint-neutral justification of state broadcasters' editorial decisions. It is a test that cannot be satisfied in virtually any situation where the broadcast deals with controversial issues, whether they be political or, more generally, cultural. If Forbes' explanation were to prevail and the decision below allowed to stand, any coverage of controversy by a state licensee would create a unique new class of beneficiaries -- those involved in the controversy. They could all demand judicial supervision of licensee decisions as to those interviewed, the amount of time devoted to each, the editing of all interviews, the presentation of background material, and any other aspect of format or editing that had the potential to impinge on the right of each member of the protected class to viewpoint-neutral coverage. The answer to Forbes is in *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973): "Regimenting broadcasters is too radical a therapy for the ailment respondents complain of."

Indeed, the conflict between the Eleventh and Eighth Circuits is not over whether the First Amendment applies to a state public broadcaster's editorial decisions in producing candidate debates, as Forbes contends (Opp. Br. at 9-10), but *how* it applies. In the Eleventh Circuit's decisions in *Chandler* and *Schneider v. Indian River Community College Found.*, 875 F.2d 1537 (11th Cir. 1989), the First Amendment is used to protect the editorial prerogatives of the broadcast licensee,[2/] consonant with *CBS v. DNC* and

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[2/] *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). Judge Rubin's opinion is the law of the Fifth and Eleventh Circuits. *Schneider*, 875 F.2d at 1541. His opinion states that the First Amendment does not require a state broadcast licensee's decisions to be content-neutral. *Muir*, 688 F.2d

FCC v. League of Women Voters, 468 U.S. 364 (1984). In the Eighth Circuit's decision below, the First Amendment protects members "of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat). . . ." (App. 12a.) It is the broadcast licensee that violates the First Amendment by not inviting all candidates. This disagreement on application of the First Amendment is palpable in footnote 4 of the Eighth Circuit's opinion: "we respectfully disagree with the Eleventh Circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions." (App. 13a.)

Forbes emphasizes that he "was a member of the class intended to be benefited by AETC's debate," Opp. Br. at 12, but he is wrong. The intended beneficiaries were AETC's viewers.[3/] Indeed, if AETC had sponsored the debate to advance a particular candidacy, it would have made the program ineligible for the exemption afforded under Section 315(a)(4) of the Communications Act (*see* App. 59a-60a; Petition for Cert. at 12).

Forbes expands this argument in Section VI of his brief: "a First Amendment requirement of inclusion of all balloted candidates in a state-sponsored debate lies at the very heart of the rationale for broadcast licensing of the state in the first place." Opp. Br. at 16. Unfortunately, the Eighth Circuit's demand for viewpoint-neutral justifications of state

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at 1050. Furthermore, Judge Rubin emphasizes that judicial supervision of the "content-quality-audience reaction factors that enter into a decision to use or not to use a program" must involve interference with station management. *Id.* at 1052.

[3/] *See, e.g., League of Women Voters*, 468 U.S. at 382.

broadcasters' editorial decisions embodies this novel theory. It assumes that state broadcast licensees are not protected under the First Amendment, and it creates a presumption, rebuttable only in theory, that a state broadcaster in practice will be unable to overcome. Contrary to Forbes' assertion, Opp. Br. at 3, it creates a *de facto per se* rule requiring the inclusion of all political candidates for a given office in a debate produced by a state broadcaster.[4/] Among other things, this is contrary to Congress' intent as interpreted by the courts.[5/]

In *Schneider*, on which the *Chandler* court relied,[6/] the Eleventh Circuit based its decision on the need to protect the state broadcast licensee's First Amendment rights.[7/] The

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[4/]Forbes underscores this conflict, Opp. Br. at 11 n.5: "To the extent that *Chandler* adopts a rule of law that exclusion of minor-party candidates is always viewpoint-neutral, Mr. Forbes submits *Chandler* was wrongly decided."

[5/]*See Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd, mem., League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C.Cir. 1984).

[6/]"We note that appellees contend that *Schneider* and *Muir* should not control this case. We disagree." *Chandler*, 917 F.2d at 488 n.3.

[7/]"The Trustees have the broadcast license and thus sole programming discretion. *It is the First Amendment rights of the Trustees as licensee that are being exercised by the operation of WQCS,* not those of the appellants." *Schneider,* 875 F.2d at 1541 (emphasis supplied).

Eighth Circuit, in contrast, failed entirely to take the licensee's First Amendment rights into account. It held that Forbes had stated a First Amendment claim, sufficient to survive a motion to dismiss, *based on no allegation of fact other than that AETC is a state entity*. Thus, Forbes' attempt to reconcile the Eighth Circuit's decision below with *Chandler* instead describes a regulatory regime in conflict with the decisions of the Eleventh Circuit and all other courts of appeals that have considered the issue of state broadcast licensee prerogatives, as well as with the decisions of this Court that protect state public broadcasters' rights under the First Amendment and the Communications Act.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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